his son as attorney for the estate at a fixed yearly salary. The executors refused to comply with the direction. The son brings this action to compel the executors to employ him. *Held*, that he cannot enforce the direction. *In re Wallach*, 150 N. Y. Supp. 302 (App. Div.).

Whether the power of employment or the property of the estate to an extent sufficient for compensation be regarded as the *res*, there is apparently no inherent reason why a valid trust cannot be created by a definite and mandatory direction to executors or trustees to employ a designated person in services for the estate. Such directions have been held binding in a few instances, in regard to other than legal services. *Hibbert* v. *Hibbert*, 3 Meriv. 681; *Williams* v. *Corbet*, 8 Sim. 349. In many cases, however, the recommendations have been construed as merely precatory, because of the weakness of the words, the indefiniteness of the direction, or a supposed inconsistency with the gift of the beneficial interest in the property or the administration of the estate. *Shaw* v. *Lawless*, 5 Cl. & F. 129; *Finden* v. *Stephens*, 2 Phil. 142; *Foster* v. *Elsley*, 19 Ch. D. 518; *Jewell* v. *Barnes' Adm'r*, 110 Ky. 329, 61 S. W. 360. Where the direction is to employ as attorney, the American cases usually hold that such restrictions are contrary to the policy of the law. *Young* v. *Alexander*, 16 Lea (Tenn.) 108; *In re Ogier's Estate*, 101 Cal. 381, 35 Pac. 900; *In re Pickett's Will*, 49 Ore. 127, 89 Pac. 377; *In re Caldwell*, 188 N. Y. 115, 80 N. E. 663. The necessity for coöperation between trustee and attorney in their confidential relation appears to afford basis for this conclusion.

WITNESSES — IMPEACHMENT — PARTY'S OWN WITNESS: BY PRIOR CONTRADICTORY STATEMENTS. — In a trial for fornication, the prosecutrix, as a witness for the state, denied the commission of the act. The prosecuting attorney declared that he was not surprised. Prior statements of the prosecutrix were then offered to impeach her testimony. *Held*, that the evidence is inadmissible. *State* v. *MacRorie*, 92 Atl. 578 (N. J. Sup. Ct.).

In a murder trial, witnesses for the people, to the surprise of the prosecution, testified that they could not identify defendant as the one who fired the shots. Evidence of their previous identification of the defendant was then offered. *Held*, that the evidence is inadmissible. *People* v. *De Martini*, 213 N. Y. 203.

The common law universally forbids impeachment of a party's own witness by character evidence. *Southern Bell Telephone, etc. Co.* v. *Mayo*, 134 Ala. 641, 33 So. 16. See 2 WIGMORE, EVIDENCE, § 900. But independent contradictory evidence indirectly discrediting the witness has generally been admitted. *Pacific Mutual Life Ins. Co.* v. *Van Fleet*, 47 Colo. 401, 107 Pac. 1087; *United States Brewing Co.* v. *Ruddy*, 203 Ill. 306, 67 N. E. 799. The chief difficulty has arisen in regard to the admission of the witness's prior contradictory statements, as in the two principal cases. Such statements have generally been excluded. *Wheeler* v. *Thomas*, 67 Conn. 577, 35 Atl. 499; *Coulter* v. *American Merchants', etc. Express Co.*, 56 N. Y. 585. The objections usually made are that a party guarantees his witness's credibility and that there will be danger of coercion by threats of impeachment. See *Whitaker* v. *Salisbury*, 15 Pick. (Mass.) 534, 545; *People* v. *Safford*, 5 Denio (N. Y.) 112, 118. See also BULLER, NISI PRIUS, 7 ed., 297 *a*. The former ground has frequently been shown illogical and untrue and the latter is of no cogency. See 11 AM. L. REV. 261; 2 WIGMORE, EVIDENCE, §§ 898–899. The result, moreover, is often unfair, and in some states relief has been sought by statutes which make the witness's prior statements admissible where the party has been entrapped or surprised. GA. CODE, 1911, § 5879. Since no firmly fixed legal precedents would be violated, and reason and justice would be better served, this result should properly be reached even at common law, as the New Jersey case suggests. *Hurlburt* v. *Bellows*, 50 N. H. 105; *Beier* v. *St. Louis Transit Co.*, 197 Mo. 215, 233, 94

S. W. 876, 881; *State* v. *Kysilka*, 85 N. J. L. 712, 90 Atl. 309. Any hearsay danger, moreover, can be obviated by instructions. See *Wright* v. *Beckett*, 1 M. & Rob. 414, 419; 2 WIGMORE, EVIDENCE, § 1018. In a great many American jurisdictions statutes make these contradictory statements admissible under all circumstances. See 2 MASS. REV. L. 1902, c. 175, § 24; CAL. CODE CIVIL PROCEDURE, 1909, § 2049; 1 IND. REV. STAT., 1914, § 531. Compare 17 & 18 VICT., c. 125, § 22 (1854). It is questionable, however, whether it is wise to dispense with the trial judge's discretion, or to admit the prior statements under any circumstances, where the party never hoped to elicit the truth but was seeking some dramatic effect.

WITNESSES — PRIVILEGED COMMUNICATIONS — PHYSICIAN: WAIVER BY PATIENT'S TESTIMONY CONCERNING PHYSICAL CONDITION. — A statute forbade the examination of a physician as to any "communication made by his patient" or "any knowledge obtained by personal examination of such patient," unless the patient consent or voluntarily testify "with reference to such communications." Though the plaintiff had testified as to his injuries, his objection to the examination of his physician was sustained by the trial court. *Held*, that the ruling is correct. *Arizona & New Mexico Ry. Co.* v. *Clark*, 235 U. S. 669.

For the patient to offer evidence as to the communication made to a physician is a waiver of the privilege as regards that physician. *Rauh* v. *Deutscher Verein*, 29 N. Y. App. Div. 483, 51 N. Y. Supp. 985; *Pittsburg C. C. & St. L. R. Co.* v. *O'Conner*, 171 Ind. 686, 85 N. E. 969. But the offer of the testimony of one physician is not a waiver of privilege as to the testimony of other physicians not present in consultation with him. *Penn Mutual Life Ins. Co.* v. *Wiler*, 100 Ind. 92; *Barker* v. *Cunard S. S. Co., Ltd.*, 91 Hun (N. Y.) 495, 36 N. Y. Supp. 256. *Contra*, *State* v. *Long*, 257 Mo. 199, 165 S. W. 748. See 28 HARV. L. REV. 116. Thus it appears that it is not the purpose of these statutes to keep secret the ailments of the patient, but to protect the communications which he makes to his physician. The knowledge gained by the physician through a physical examination of the patient, as well as what he is told by the patient, constitutes a communication within the meaning of the statutes. *Prader* v. *National Masonic Accident Ass'n*, 95 Ia. 149, 63 N. W. 601; *Rose* v. *Supreme Court*, 126 Mich. 577, 85 N. W. 1073. But for the patient to testify as to his symptoms, as in the principal case, without mentioning anything spoken or disclosed to the physician, since it is not giving in evidence any communication made by word or act, is properly held not a waiver of the privilege. *Green* v. *Nebagamain*, 113 Wis. 508, 89 N. W. 520; *May* v. *Northern Pacific Ry.*, 32 Mont. 522, 81 Pac. 328; *Williams* v. *Johnson*, 112 Ind. 273, 13 N. E. 872. *Contra*, *Forrest* v. *Portland Ry. L. & P. Co.*, 64 Ore. 240, 129 Pac. 1048. But see 4 WIGMORE, EVIDENCE, § 2389. This conclusion receives support from analogous decisions with reference to privileged communications between attorney and client. *State* v. *White*, 19 Kan. 445; *Bigler* v. *Reyher*, 43 Ind. 112. *Contra*, *Woburn* v. *Henshaw*, 101 Mass. 193. See 4 WIGMORE, EVIDENCE, § 2327.

BOOK REVIEWS

INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION. By A. V. Dicey. Eighth Edition. London: Macmillan and Company, Ltd. 1915. pp. cv, 577, 2.

Students of law and government have long since learned to welcome each new edition of this deservedly famous work, but the eighth edition will be especially appreciated for its introduction. Since Professor Dicey first published this book in 1884 great and far-reaching changes have occurred in the structure of the